MICHIGAN SUPREME COURT

PUBLIC HEARING
MAY 18, 2016

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CHIEF JUSTICE YOUNG: Welcome this afternoon to the public hearing on a series of our pending administrative matters. For those of you who are not familiar with our processes, those speakers who are endorsed are entitled to three minutes – and only three minutes – time to address the Court on the matter on which they are endorsed. You are- Many of you have supplied written commentary and if you find three minutes are insufficient, you are invited to supply written support to the Court. I am advising you, however, the Court has a very tight schedule today and I will be holding the endorsed speakers to three minutes and only three minutes in order for us to conclude in time to deal with our other responsibilities. So with that, I will call the first item for which there is an endorsed speaker. It's Item 2, ADM File 2014-13, an amendment that would reduce the time by which a party must accept or reject a case evaluation. And we have one endorsed speaker, Lori Frank.

ITEM 2 (ADM File No. 2014-13)

MS. FRANK: Good afternoon Justices, my name is Lori Frank, I am with the Oakland County Bar Association. We appreciate you giving this opportunity to speak today on this proposed rule change. There are three things I want to address: Timing, mechanics, and the applicability. Going from 28 days to 14 days really makes it ten business days. When you're talking about the holidays or if your client's on vacation, that's very, very little time to secure an acceptance. On the mechanics: You receive an award, you get a number, you then have to go back and craft a written correspondence, either a letter or e-mail form, to your client contact and try to explain how the evaluators came up with that number and the ramifications of acceptance or rejection. You should get the acceptance in writing because now you're compromising your client's claim if you're accepting that award. How does this all apply? If you have an individual client, he or she may want to meet with you and talk about it, have questions, get through the emotional aspect of it, and then come in with a considered decision. Again, you need that in writing- You should have it in writing. And then get it over to the case evaluators. If you have an institutional client –

municipality, corporation, you know, local council, well now you're talking about additional people that are involved because your contact may or may not be the decision maker or have the capacity to make that decision. So now you have to go up that ladder either to the decider or the decision making body, come back down that ladder, get you that acceptance, and send it over to case evaluation, all within ten business days. And if you don't do this, you have a no response rejection, which then commits your client to possible sanctions for rejecting. So for those reasons, we would respectfully request that the Court reject this proposed amendment.

CHIEF JUSTICE YOUNG: Thank you very much.

MS. FRANK: Thank you.

ITEM 4 (ADM File No. 2014-27)

CHIEF JUSTICE YOUNG: The next item for which there is an endorsed speaker is Item 4, ADM File 2014-27, which concerns an amendment to clarify that a request for production of documents may be used- Issued a reasonable time after a complaint has been served. Christopher Harrington is endorsed.

MR. HARRINGTON: Good afternoon, may it please the Court. I'm appreciative of having the opportunity to speak in front of the esteemed Justices on this beautiful afternoon.

CHIEF JUSTICE YOUNG: I'd rather be outside.

[LAUGHTER]

MR. HARRINGTON: Christopher J. Harrington, I'm appearing on behalf of the Family Law Council for the Family Law Section of the State Bar and in support of the proposed amendment to MCR 2.305. Why do we support this? I think the answer to that is we'd like to see consistency and clarity within our court rules, and the crux of this proposal is to make sure that subpoenas, for the purpose of producing documents, you know, follow a certain timeline that is already provided for in a couple different areas of the court rules. Number one, you have a reasonable time standard within the deposition court rule. You also have, under 2.310(D)(1), that is the court rule on request for production of documents to third parties, there is also a reference to MCR 2.306, reasonable time standard. So I think a lot of attorneys are out there using subpoenas as, you know, a request for production to third parties. You seem to have the

intent of that covered in a couple different areas of the court rule, and we'd like to see that clear throughout. There's also an instance where, under the current construction of the court rules, you could file an action, not serve the initial pleadings, and then blanket the town with dozens of subpoenas without the other party even having notice that there's a case out there. Of course you have to copy the subpoenas on the opposing party, but if the Court were to adopt this proposed modification, it would avoid that problem, and you'd have to serve the other party with the pleadings and go for the normal route. So really what the Family Law Section thought was that we'd like to avoid any abuse of discover process and to move forward manner, so we would ask the Court to adopt the proposed amendments.

CHIEF JUSTICE YOUNG: Thank you. The next item five is ADM 2014-28, the endorsed speaker is Randy Wallace.

ITEM 5 (ADM File No. 2014-28)

MR. WALLACE: Good afternoon, my name is Randy Wallace. I'm testifying on behalf of the State Bar of Michigan. I'm attorney with the litigation firm called Oldsman, Mackenzie and Wallace. Our firm handles litigation files across the state. With regard to notice of case evaluation, I am only aware of one county – there could be more, but I am only aware of one county – that does not send, when the notice is sent, send a list of the list of the case evaluators. Every other county with which I've conducted business sends the list of case evaluators, and that's a good thing because basically when you get that list, you can check to see if you have a conflict with any of the evaluators, and there are appropriate remedies in the event that you do. You can file a motion to disqualify if the ADR clerk doesn't just immediately contact the person and that person disqualifies him or herself. The one county that currently I'm aware of that does not do this is Wayne County, and, in practice, what happens in Wayne County is you show up for the case evaluation, and on the date of the case evaluation the conflict is identified, and then if there are other panels that are case evaluating that day, the conflicted attorney steps out, and they take an attorney from one of the other panels, and that person conduct the case evaluation. And, of course, the problem with that is that that attorney has not reviewed any of the materials, has not reviewed the summaries and is basically in the dark with the exception of whatever information he or she is provided at the case evaluation. I think a very simple remedy to this problem would simply be to indicate in the court rule that when the notice is

sent, the names of the evaluators should be contained on the notice. I believe of the proposed versions of this, the one that was submitted by the State Bar is the cleanest. There were some objections to the version that was submitted and is being decided here today on the basis that the provisions pertaining to replacement evaluators would allow the ADR clerk to adjourn case evaluation and also there were some other concerns. I think the version submitted by the State Bar is the cleanest, it essentially says if there's a replacement, the ADR clerk has to notify the parties within a reasonable time. Thanks.

CHIEF JUSTICE YOUNG: Thank you very much. The next item 7 is number 2015-12 and there are multiple endorsed speakers, the first of which is Sophia Nelson. This is the ability-to-pay question.

ITEM 7 (ADM File No. 2015-12)

MS. NELSON: [INAUDIBLE WORDS 9:44 – 9:46]

CHIEF JUSTICE YOUNG: That's the first test.

[LAUGHTER]

MS. NELSON: I failed. [PAUSE] Good afternoon, and may it please the Court. Sophia Nelson on behalf of the State Appellate Defenders Office. I'm here today to express the State Appellate Defenders Office strong support for this proposed package of court rule amendments to address ability-to-pay and incarceration for failure to pay. Now, we join many of our colleagues from the State Bar, as well as the Criminal Defense Attorneys of Michigan and the ACLU in support of these proposed amendments. We submitted a written comment on March 7th in which we suggested an additional amendment to MCR 7.108 for this Court's consideration regarding staying sentences of incarceration for failure to pay pending the elapsement of the time to take an appeal of right. And this is because many of these sentences are short in nature and therefore escape judicial review because they're mooted out before an appellate court can review a lower court's decision concerning ability to pay and willfulness for failure to pay. And unless there are any questions, I will end there.

CHIEF JUSTICE YOUNG: Thank you very much.

MS. NELSON: Thank you.

CHIEF JUSTICE YOUNG: Daniel Korobkin. [PAUSE] Did I mangle your name, sir?

MR. KOROBKIN: Daniel Korobkin, Mr. Chief Justice.

CHIEF JUSTICE YOUNG: Korobkin. Wrong emphasis.

[LAUGHTER]

MR. KOROBKIN: Mr. Chief Justice, and may it please the Court. My name is Daniel Korobkin and I am the deputy legal director for the American Civil Liberties Union of Michigan. The ACLU supports the proposed court rule amendments that would codify the constitutional requirement that ability to pay hearings be conducted before a person is jailed for nonpayment of fines, fees, and costs. For over five years, the ACLU staff, interns, and volunteers have been engaged in court watching throughout the state. We have documented a widespread and systemic practice in which poor people are sent to jail because they cannot afford to pay their fines, fees, and costs. The practice is often referred to, colloquially, as "pay or stay" sentencing, because defendants are required to stay in jail for a specified amount of time if they cannot afford to pay the Court a specific amount of money. In addition to "pay or stay," the practice is sometimes called "fine or time" or even "days or dollars." I think the Court gets the point. In short, we discovered that thanks to this widespread practice, when it's conducted without an ability to pay determination, county jails all over the state were becoming the new debtors' prisons of the 21st century. So clearly something had to be done, and in an effort to curb the practice, the ACLU has represented many indigent defendants in appealing these sentences. This has required us to file emergency applications for leave to appeal, emergency bond pending appeal motions, requests for expedited transcripts, affidavits from court watchers, and so forth. So our attorneys have appeared in district courts and circuit courts all over the state to represent indigent defendants seeking release from jail or a fair sentence that accommodates their limited ability to pay. Now, notably, we have been successful in all of the individual appeals because the U.S. Supreme Court case law is very clear on this point. But there's no- Because there's no specific state court rule codifying the requirement for ability to pay hearings, the problem remains systemic and widespread throughout this state. So we have been a proud coalition partner with judges, the State Bar, Legal Services, other stakeholders, in building consensus around the contours of this proposed court rule amendment. And it

represents a positive and necessary step toward fulfilling our collective commitment to equal and fair justice under law. So thank you to the Court, the ACLU strongly encourages the Court to adopt the amended court rules, and I appreciate your time.

CHIEF JUSTICE YOUNG: Thank you very much. Valerie Newman. [PAUSE] Oh, sorry. I will- I will get back to the judge. Go ahead. I skipped someone, but I will- we'll get back.

MS. NEWMAN: Would you like me to step back? I can let that person go.

CHIEF JUSTICE YOUNG: No. You're at the podium. Go. Your time is running.

[LAUGHTER]

MS. NEWMAN: Thank you, Chief. Why did I expect that from you?

[LAUGHTER]

MS. NEWMAN: Valerie Newman, and I am speaking today on behalf of the State Bar of Michigan. I've been working on this issue for – I don't know – seven or eight years to get to this point, so I'm [INAUDIBLE 14:51] to be here, to be able to support the rules. The State Bar of Michigan has supported these rule amendments through the representative assembly as well as the board of commissioners, and I know you have lots of speakers. So unless the Court has questions, I'm going to do what I do best and be quiet-

CHIEF JUSTICE YOUNG: You're a great advocate.

[LAUGHTER]

MS. NEWMAN: -and I'm happy to answer any questions.

CHIEF JUSTICE YOUNG: Thank you very much.

MS. NEWMAN: Alright.

MS. NEWMAN: Judge Reincke.

JUDGE REINCKE: Julie Reincke, District Court Judge from neighboring Eaton County. I'm here on behalf of the Michigan District Judges Association to request that you adopt the

proposed court rules on ability to pay. As District Court judges, we are at the front lines of imposing and collecting fines and costs. We are also commonly in a busy, fast-paced courtroom. Putting our constitutional obligations in the form of a cycynct court rule will help in applying the law to individual cases. Many of us have had our consciousness raised in recent years as our felt obligation to collect money for our funding units is weighted against our duty not to impose manifest hardship on defendants and their families. We will be educated and supported in honoring the constitution by having this court rule to refer to. Concerning proposed amendments, we support an amendment to 6.4253(B) to specifically refer to community service as an alternative option. We do not support a change to try to define willfulness of failure to pay specifically in 6.4253(C)(3), and think those should best be left to the comments section. We do not support proposed amendments suggested by the 36th District that would shift the burden of proof to the defendants or the suggestion of State Appellate Defenders Office that any jail sentence be delayed until the end of the appeal period. Thank you.

CHIEF JUSTICE YOUNG: Thank you very much. Patricia Carey.

MS. CAREY: Mr. Chief Justice and Your Honors, may it please the Court. My name is Patty Carey. I have the honor and privilege of representing homeless individuals in a specialty court in Detroit. We obtain post-conviction relief for these individuals. In addition to that, I also have the privilege of representing these folks in the District Courts in the metropolitan area, because part of our court program requires that our clients be walked in on any outstanding warrants. Most of my clients spend between six to ten years living outside of society because of fines and costs they have absolutely no ability to pay. They desperately want to make amends for their past behavior, but unfortunately, they cannot do so with money. They are fearful that their pleas for alternative sentencing will go unheard because the majority of them have been jailed, despite their having been too poor to pay. It sometimes takes hours to convince them to walk into court. I do this, often on a daily basis. They are afraid that if they go in there empty handed, without money, they will be thrown in jail. I personally have borne witness to clients right before my case being negatively impacted by the pay or stay sentencing described to the Court today. Recently, while awaiting a case, an unrepresented indigent litigant was not very lucky. She walked in on an eight year old warrant in front of a District Court Judge. She told the judge that she had not been able to pay

because she had not worked for several years. She got a job Friday, just three days before she walked herself into court, by the way, and she came to court the second she was- Saw money on the horizon to tell the Court, "I'm now going to have money. I want to pay you. I want to do the right thing." The Court looked at her, lectured her for a long time on the fact that she had neglected her obligations, and then they sentenced her to jail. A short sentence, as described, which was mooted out, and which was- Ended up not being appealable because of that. I should not have this job. My clients and that woman should not need a specialty court to get post-conviction relief when the law already mandates that courts inquire as to a person's indigencey when consideration- When considering whether or not they are indigent and looking to incarcerate them for nonpayment. We have brought before the Court today individuals impacted by this particular practice. I appreciate your time in listening to their stories, I thank the Court for listening to me, and I strongly urge that the Court adopt the rule changes proposed in ADM 2015-12.

CHIEF JUSTICE YOUNG: Thank you. Chukwuemeka Nealis.

MR. NEALIS: Good afternoon, Justices. My name is Chukwuemeka Nealis.

CHIEF JUSTICE YOUNG: Oh, wrong emphasis again.

MR. NEALIS: Pardon me?

CHIEF JUSTICE YOUNG: I was making a joke about my mispronunciation of your name. Sorry.

MR. NEALIS: [LAUGHTER] Okay. My name is Chukwuemeka Nealis. Personally, I've been affected by this pay or stay hearing- This pay or stay proceedings. I'm a very hardworking man, I'm a father of four. I work maybe 15, 16, sometimes 18 hour days. And a certain situation, I was told that I had to pay a certain amount of money. I didn't have that amount of money. So I gave them what I had. After that, I was to come into the courtroom. I had contacted the court, let them know I don't have the funds right now to pay you, but if you give me a certain amount of time, then I can make that payment. The Court said, well, come on in here. [LAUGHTER] And when you come in, you can make arrangements, and on this day we're going to put you into a the county jail for a certain amount of time if you can't pay that. I didn't go. From that point on, by me neglecting to go that day, I received a warrant, I lost my driver's license, I lost

hours at work because I had to take public transportation. That dominoed down and affected my family in a certain type of way. All I'm asking today is that you please, all of you please just reconsider how these things are and how they affect families, how they affect people in general. Thank you for your time.

CHIEF JUSTICE YOUNG: Thank you for coming. Dennis Sloan.

MR. SLOAN: Thank you for this opportunity. My name is Dennis Sloan, I am a Michiganian who is still recovering from a vicious cycle, a vicious downward spiral in my life that began due to my inability to pay a traffic ticket, and my fear of being incarcerated. Now I lived in the shadows for like seven years due to not wanting to go to jail and not having the money to pay the Court. The current environment of pay or stay is a vicious cycle to too many poor Michiganians. Due to the lack of employment, I was unable to pay a parking ticket and decided to walk out of the courtroom when the person before me was sent to jail for not having the money. Now, I am not a criminal. I've always strived to be a productive member of society, and I've always had a fear of incarceration. Now this led to a warrant that was for my arrest. This led to me having to live under the radar. I was then able to- Unable to gain employment, to feed my family. I was forced into a black market economy, and eventually it led me to homelessness and criminal activity and other bad choices. I did get a second chance at life, but there are a whole lot of Michiganians who won't get that chance. Now I ask you that you please end this pay or stay rule in the judicial system. It affects a lot of poor Michiganians, a lot of hardworking Michiganians, a lot of Michiganians who want to do the right things, but because of their fear of incarceration, or fear of being separated from their families, they choose to become an absconder. I used to do a lot of desperate things before. Today I'm making reading fun for children who are at risk of illiteracy at People's Community Rec Center in Hamtramck. I used to be homeless, and just recently I moved into my own apartment, and that's why I'm a little underdressed today – I do apologize, but I moved a few things this morning into my apartment. So there's a lot of things that are happening today because I got a second chance and I'm asking that you please give poor Michiganians that same chance. Thank you.

CHIEF JUSTICE YOUNG: Thank you very much. Lesia Van Arsdale.

MS. VAN ARSDALE: Hi. My name is Lesia Van Arsdale, I'm an advocate for Detroit Action Commonwealth. My experience was that

I tried for years to get my life back on track, but being a single mother with three children, it was hard. My kids wanted to join activities such as volleyball, basketball, soccer, and things, but because I had no driver's license, that led to a lack of things we could not do. I've always worked, and I always was on a budget in the house. I finished school with my high school diploma. I've never been a criminal, so me meeting Street Court was a blessing for me. They took me to courts that I was afraid- That I was always afraid to go to on my own for that being- To go to on my own for that being pay or stay, they always talked about locking you up. And I lost- I was always scared of being lost in the system and not having anyone to make sure my kids got home from school safe. But thanks to this great program, I am now doing a great job with taking me and my family higher in life. I ask if the courts can please change the court rule, it would help out a lot of mothers in my position.

CHIEF JUSTICE YOUNG: Thank you very much. Last item we have endorsed speakers is Item 10, ADM File No. 2015-27. Proposals for the first set of minimum standards for the indigent defense submitted by the Michigan Indigent Defense Commission. Judge Fisher. [PAUSE] Is there anybody from MIDC you didn't bring to speak today?

[LAUGHTER]

ITEM 10 (ADM File No. 2015-27)

JUDGE FISHER: We'll be- Well the four favorite words of every judge: I will be brief, as will everyone else. Thank you for the opportunity to speak in support of the standards we have proposed. Approval of the standards, I think, will mark an important milestone in our effort to improve our system of justice in Michigan. This is- I've been a lawyer for nearly 40 years now, this has been a recognized problem for my entire legal career, so you can imagine I had some trepidation when Judge Gadola contacted me five years ago and asked me to chair the advisory commission that led to the legislation establishing this commission. It's been, to my surprise, our recommendations actually resulted in legislation and it's been a very rewarding experience. We've worked with people from every political background and philosophy. It's been interesting to me how everyone, no matter their background or profession are dedicated to the four words inscribed on your entrance – freedom, equality, truth, and justice. We recognize that everything we do is subject to criticism from any number of groups, but I want you to know that we have done substantial outreach to all of the

stakeholder groups, our staff has made countless visits to courts around the state, we've presented our proposals to all of the judges' associations, to the prosecutors, the counties, and the criminal defense attorneys. So the legislation under which we work is not perfect, our recommendations are not perfect, it's a work in progress, but I think this gives us an opportunity to work in a collaborative way to address a longstanding problem in our judicial system. Thank you.

CHIEF JUSTICE YOUNG: Thank you. James Sacks. Jonathan Sacks, rather.

MR. SACKS: Good afternoon, may it please the Court. I'm Jonathan Sacks, executive director of the Michigan Indigent Defense Commission. I know there are a lot of speakers and not much time. Mainly, I want to take questions, if there are any. The one very brief statement I will make goes to Standard 4. I know there have been a lot of comments there, and Standard 4, two quick things: The first is the authority question. The MIDC Act sets standards and makes it clear that the purpose of standards is to effectuate constitutional guarantees for effective assistance of counsel. One of those requirements is obviously assistance of counsel at critical stages. In Michigan, the reality is, at first appearance, it is often a critical stage. Guilty pleas are taken, there are negotiations with prosecutors, folks walk out of the courthouse with misdemeanor convictions without realizing the consequences, so the commission decided to best represent folks at critical stages, we needed to have counsel first appearance. And of course the second piece there is through two SCAO-funded pilot projects and national results and studies. We've seen data-driven how good the results are, how important it is for somebody to have counsel at what is potentially the first time they ever see a court, first time they ever see a judge, first time they ever come into contact with the criminal justice system, and to have that advocacy and how it impacts everything else. If there's any other time, I'm here for questions on any standards, on process, on the statute, on anything at all. Thanks.

CHIEF JUSTICE YOUNG: Thank you very much.

MR. SACKS: Thank you.

CHIEF JUSTICE YOUNG: Michael Puerner.

MR. PUERNER: Good afternoon, Your Honors. My name is Michael Puerner. In my professional life, I am general counsel

at Hastings Mutual Insurance, but here today I am a general public member of the MIDC. I encourage the Court to approve our first four standards the commission has submitted. Because I do not regularly practice law in the criminal system, I strive to bring a broad and objective viewpoint with regard to the work of the commission. From that perspective, I submit that the standards are beneficial because they are balanced, meaningful, and flexible. First, the standards are balanced. They harmonize the differing views of key stakeholders, including prosecutors, defense lawyers, and judicial officers. For example, Standard 3, governing investigations and experts mandates that counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Reasonable request must be funded, as required by law. As we know, investigative resources are costly, and there must be limits to their procurement through public funding. The controlling limit here is a standard of reasonableness. The need to deploy reasonable use of investigative resources is a reality for the defense, the prosecution, and the court. Second, the standards are meaningful. With defendants' six amendment rights at stake, we set out to effect meaningful change through these standards. For example, Standard 2, governing the initial interview, mandates that when a client is in local custody, counsel shall conduct an initial client intake interview within three business days of appointment. A prompt initial interview is critical to establishing early attorney-client rapport on the way to effective assistance. Ensuring attorney contact in the unsettling times of early custody is also humane and the right thing to do in a civilized society. Moreover, we believe this standard, as it's specifically written in the three-business day rule is achievable. Third, the standards are flexible, and adaptable to the varying judicial system throughout the state. For example, Standard 1, governing attorney training mandates 12 hours of training for attorneys and an additional skills training for attorneys with two or fewer years of experience in Michigan criminal law. This is part of the statutory mandates, and we can debate whether there should be a reasonable continuing education requirement for attorneys overall. I personally wish there were, but it is specific to this statute. That training can be achieved through existing statewide programs or at the local level, and the standard invites creativity to take practical approaches to getting it done. For example, we anticipate that rural systems may pool their resources into reginal training [INAUDIBLE @ 34:45]. The standard invites practical and flexible application.

CHIEF JUSTICE YOUNG: I'm sorry, sir. Thank you very much.

MR. PUERNER: Thank you. So we support the standards and we encourage the Court to adopt them.

CHIEF JUSTICE YOUNG: Nancy Diehl.

MS. DIEHL: Good afternoon, Your Honors. I am a member of the Michigan Indigent Defense Commission, State Bar Appointee, but I'm here to talk to you about- Really about my career as a Wayne County Prosecutor, in the years in the trenches, and to point out how important it is to the system, for everyone involved, to have competent defense attorneys. And as a prosecutor, who's duty it is to see that justice is done, it is sometimes difficult when the opposing attorney is not prepared, doesn't know the law, has not brought proper motions or other things in the case. And most prosecutor's offices are overburdened, but still it's our duty to try to ensure that there's a proper conviction. Because the last thing we want is a case going forward and a conviction to having it come back. First off, you might end up convicting an innocent person, which means the real perpetrator is still at large, or the case comes back and it just reopened, reopens the wounds to victims and other people involved. Most important thing we are doing today in terms of these initial standards is moving forward. It will make things better. It's a good start to make the system more fair. We need competent attorneys, defendants deserve a competent attorney, the entire justice system deserves, and prosecutors will appreciate it, as well as everybody involved in the system. Thank you.

CHIEF JUSTICE YOUNG: Thank you very much. John Shea.

MR. SHEA: Good afternoon. I am John Shea, I am a commissioner on the MIDC. I was nominated by the Criminal Defense Attorneys of Michigan. I've been a lawyer for 34 years, I've been a criminal defense attorney for almost 30 of those years, and for the vast majority of the years I've been a criminal defense attorney, I took state court appointed cases. I still take federal appointed cases. I'm fortunate to have a retained clientele, as well, and me- Me- Myself, I should say, and those of my colleagues who are competent, well-trained, understand their roles in the system, they view what these standards embody as required in providing effective assistance. It shouldn't be- Come as any surprise that we think we need to be and remain properly trained. We need to engage our client promptly and confidentially. We need to promptly investigate our cases and identify the need for other investigators and

assistance of experts where necessary. We need to represent our clients at arraignment and initial bond hearings for the obvious reasons. It should be no different in representing indigence. 80% of our felony filings, I'm estimating – and I may be conservative – involve indigence. Involve appointed counsel. That part of the system is the rule, it's not the exception. And what we view as important components as effective assistance in retained cases should be no different than when we're representing the indigent. I've spoken to countless defense attorneys across the state through the years that this initiative has taken to get where we're at now, and the vast majority of the defense attorneys who I talk to support these standards, support the concepts that underlie them, recognize that they're important in providing effective assistance. Notwithstanding that, they're understandably concerned about where they're going to come up with the resources in order to shoulder the burdens that formal standards are going to impose. We're sensitive to these concerns on the MIDC, but the Act does not contemplate the imposition of additional burdens without the allocation of additional resources. The Act says that if we impose additional burdens that require additional resources, the State needs to allocate those resources. But it should come- The standards have to come first. We're not going to get resources without standards, so we urge that the Court adopt the standards, and then the next stage is for the MIDC to engage the legislature and the other resource-providing bodies to allocate the appropriate resources for the appropriate standards. Thank you.

CHIEF JUSTICE YOUNG: Thank you. Henry Schuringa.

MR. SCHURINGA: Honorable Justices of the Supreme Court, I represent the general public as a commissioner on the Michigan Indigent Defense Commission. Having served as a pastors' seminary professor and prison ministry leader over many years, I have a deep interest in this vital issue, and I appear before you today to request that you approve the first four standards for the following three reasons: Number one, the general public expects fairness in the courts. The general public that I run into assumes that in America, including Michigan, everyone gets a fair shake. If a person is convicted and imprisoned, well, they must deserve every day they spend behind bars. And after all, the constitution guarantees everyone equal access to the courts, whether they can afford it or not. When I share with people that Michigan has one of the worst public defense systems in the nation due to, among other things, overworked, underpaid, or uninformed public defenders, they can hardly believe it. Jane

and Joe Smith are clueless that the poor, including people of color, often do not receive adequate representation, that they may have the briefest of time to confer with their so-called advocate, and that they are usually pressured to settle for a plea-bargain. Who could believe that in our state, such a severe infringement on constitutional rights is tolerated? Number two, the general public would sense that this is a moral issue. Now, I'm a pastor, so that moral dimension may be more obvious to me than others, but I doubt it. Any person of faith would agree that the improbability of poor people getting a proper defense in too many of our courts is just plain wrong. But this is not only a conviction of people of faith. Those who claim no faith also know, deep down, that in such a situation, something is terribly amiss. Michigan's current state of affairs and indigent public defense isn't affront to any reasonable person's moral compass. And, finally, there's a fiscal dimensions. The cost to Michigan taxpayers is $30,000 a year to incarcerate an adult. Does it make good fiscal sense to spend revenue to incarcerate those who may be innocent or over sentenced? Would not our hard-earned tax be more wisely spent on adequate representation to help avoid wrongful incarceration. Yes, undoubtedly, it will take an investment of tax revenue to fix our broken system, it may take a few years before the public defense system is in effective working order in every county, but our investment may have the long-term result of a tax savings with fewer people incarcerated. That being said, however, even if it long-term proves to be a wash, the taxes of the general public will be spent wisely – to protect the public from those who truly deserve to do time for their crime. I humbly request the esteemed Justices if you agree that the presented standards are going in the right direction for resolving this constitutional, moral, and fiscal crisis, that you would approve and bless our efforts so that there can be liberty and justice for all in the great state of Michigan.

CHIEF JUSTICE YOUNG: Thank you.

MR. SCHURINGA: Thank you.

CHIEF JUSTICE YOUNG: Margaret Raben.

MS. RABEN: Chief Justice and Justices, my name is Margaret Raben.

CHIEF JUSTICE YOUNG: Wrong emphasis again.

[LAUGHTER]

CHIEF JUSTICE YOUNG: Sorry.

MS. RABEN: I am here as a representative of Criminal Defense Attorneys of Michigan, CDAM. We submitted written comments supporting the first four standards, but I was asked to come and make some public comment in addition to our written support. We adopt these four standards and urge you to adopt them, knowing that they are going to require change on the part of some criminal defense attorneys in the way they handle cases, indigent defense cases, in particular. We believe that they are going to improve defense involvement and participation in the defense system before our indigent cases waive various constitutional rights. We think these standards create some modest parody with prosecutors as to the availability of expert and professional services to assist our client, and we think that overall, these four standards will create a fairer and a more defendant-oriented system, which gives us a stronger position as one of the three stakeholders, if you will, in the criminal justice prosecution system. I would like to add one other comment – And I do assign counsel defense in Oakland County and I do it in the federal court, and I have done it for 30 years, so I have seen the two sides, the three sides, the six sides of the system. But I would say this: That the four standards are a good first start. And I think they are absolutely a required first start, but it would be the responsibility of others in the system to ensure that our defense responsibilities can be met, and that's not just money, and it's not just more money. The system and culture that we currently have of early plea-driven defendant resolution must change if, in fact, we're going to be able to implement these standards and the ones that will be presented to you later on. Thank you for your attention.

CHIEF JUSTICE YOUNG: Thank you very much. Robert Boruchowitz.

JUSTICE MCCORMACK: It's Boruchowitz.

CHIEF JUSTICE YOUNG: Boruchowitz, sorry.

JUSTICE MCCORMACK: Boruchowitz.

CHIEF JUSTICE YOUNG: I'll let him pronounce it. Boruchowitz.

[LAUGHTER]

MR. BORUCHOWITZ: Thank you, Justice McCormack. Mr. Chief Justice, members of the Court, thank you. I'm a professor at- Bob Boruchowitz, I'm a professor from Practice and director of the Defender Initiative at Seattle University School of Law. I have 42 years of experience in public defense, including 28 years as a chief defender. I have been providing technical assistance to the commission staff as part a grant project funded by the U.S. Justice Department. These four proposed standards are a good first step to the comprehensive reform of public defense that the commission was established to accomplish. I agree with Mr. Shea that the areas they are address are required for effective representation. I'd like to focus now on the proposed standard regarding counsel at first appearance. Early ineffective representation can be crucial to the outcome of the case. When a defendant is first brought before a judge, important decisions are made, including whether the defendant will be released. Clients who are out of custody are more able to assist in their defense and more likely to obtain a more favorable sentence. If they are in jail, it can dramatically affect not only them, but also their family, as even a few days in jail can result in losing jobs and housing. Accused persons need to be able- Need counsel to be able to challenge probable cause, advocate for release, address any immediate health issues, advise of the possibilities of trial, and the consequences of a guilty finding. When defenders are able to begin their investigation more quickly, they're more likely to be able to obtain helpful evidence and to prepare for trial or plea negotiations more effectively. And while taking guilty pleas at the first appearance is rarely an acceptable approach, it does happen a lot in Michigan. It doesn't permit counsel to investigate the case, but in some courts there is pressure to take guilty pleas at the first appearance, and in that situation, it is critical that counsel be available to assist in evaluating any plea offers, negotiating a plea, and in advocating at sentencing should their client decide to plea guilty. I want to emphasize quickly that in terms of cost, lawyers at first appearance can reduce the number of people going to jail, saving cost. There are also ways to divert a lot of the cases such as driving suspended license out of the system, saving more money than it would cost to put lawyers in. In Washington state, we have court rules that the Court has adopted, including standards for public defense that- And we also have court rules including lawyers at first appearance. In my practice in Seattle, we've always done that. I'm consulting with a small city north of Seattle, the city of Edmunds, they provide lawyers at first appearance. I've seen it done

effectively in Louisville, Kentucky. It's possible to do it, and it can be done effectively. I also endorse strongly the other three standards before you: prompt, thorough, and confidential interviews, investigation, use of experts. This first set of standards would be a strong foundation for the continued work of the commission and help to improve representation for the neediest persons in Michigan's criminal courts.

CHIEF JUSTICE YOUNG: Thank you.

MR. BORUCHOWITZ: Thank you.

CHIEF JUSTICE YOUNG: Michael Waldo.

MR. WALDO: Good afternoon. Thank you very much for the opportunity to be here today. My name is Mike Waldo, I am a special assistant defender at the State Appellate Defender Office. For the past year, I have worked at SADO under a federal grant where I work to identify cases upon appointment that require appellate investigation. With that background, and on behalf of SADO, I respectfully request this Court to approve the proposed standards by the Michigan Indigent Defense Commission, and I will briefly address Standard 3, which is the trial counsel's duty to investigate and to consult with investigators and experts in defending the case. In her comment to this Court on this issue, our director cited the recent exoneration of Derrick Bunkley. In Mr. Bunkley's case, his trial counsel failed to have his client's phone- Cell phone forensically analyzed, which would have corroborated Mr. Bunkley's alibi and shown that he was nowhere near the crime scene on the date and time in question. Sadly, Mr. Bunkley's case is not unique. During my year at SADO, I have seen many cases come through our office that involved cell phone forensic analysis, and rarely have I seen a case where the defense had an expert to assist him or her in their case. We've seen cases where the prosecution has presented misleading cell phone evidence, but there was no defense expert there to help refute that testimony. And we've seen cases where defense counsel plainly failed to investigate this issue and therefore didn't present exculpatory evidence in defense in the case. And in subsequent Ginther hearings on these issues, we've heard varied responses from trial counsel as to why they didn't pursue or consult with an expert on this issue. We've heard counsel testify that they didn't pursue an expert because they didn't understand the technology. We've heard counsel say that they didn't pursue an expert because they didn't believe that this evidence was sufficiently probative. We've heard counsel say that they didn't ask for an expert

because they knew the trial court was going to deny request. And we've heard trial counsel say that they didn't request expert funds for this issue because they can't find an expert to conduct the analysis, given the fees approved in a given county. I believe that the proposed standards make it very clear that those answers are unacceptable, and the proposed standards are a step in the right direction that ensure cases like Mr. Bunkley's are less and less common in the state of Michigan. Subject to any questions by the Court, I thank you for your time, and respectfully request that you approve the standards as written.

CHIEF JUSTICE YOUNG: Thank you.

MR. WALDO: Thank you.

CHIEF JUSTICE YOUNG: Judge Knoll.

JUDGE KNOLL: Good afternoon, Mr. Chief Justice and Justices of the Supreme Court. I am Bradley Knoll, and I am Judge of the 58th District Court located in Ottawa County. I have been a judge for the past 13 years, and for the 25 years preceding that, I was in private practice where a substantial portion of my practice was devoted to representation of indigent defendants. This is my first appearance before the Supreme Court, and although I would like to fully savor the three minutes, I think that I can state my position in less time than that. In reviewing my written materials, I realize that if I deleted all of the kvetching about the practical difficulties for both the court and for appointed counsel, that my position boils down to two points. The first is whether or not the Michigan Indigent Defense Commission Act imposes limitations upon the Commission in the promulgation of the minimum standards, and I believe that it does, and the second is whether Standard 4 exceeds those limitations by imposing new constitutional standards requiring that counsel appear- Appointed counsel appear with the defendant at the initial arraignment. This Court, nor has the Supreme Court, ever deemed that arraignment to be a critical stage in the proceedings, which is the triggering process, so I don't believe that it's within the scope of the Commission's authority to impose that new standard here. It's a position that I'm uncomfortable taking because it differs from organizations and individuals with whom I have a great deal of respect, and my ideas as to whether it's a good idea or not vary from theirs, but I think that that's asking the wrong question. I think the question squarely lies under what the statute authorizes or does not authorize and whether the proposed Standard 4 is faithful to that standard, and I believe it does not. Thank you very much.

JUSTICE LARSEN: Can I ask a question? Quick, for a minute.

CHIEF JUSTICE YOUNG: Go for it.

JUSTICE LARSEN: We haven't asked any, so-

[LAUGHTER]

JUSTICE LARSEN: Where do you think that limitation comes from? I take it your position is that the MIDC can only propose rules that are on all fours with what the Constitution demands, and they can't do anything more than what the Constitution demands, is that your position?

JUDGE KNOLL: That's my position. I don't think the Commission can announce new Constitutional standards.

JUSTICE LARSEN: Well of course they can't announce new Constitutional standards. My question is whether their authority to recommend rules, and presumably our authority to approve them, is limited by what the constitution demands? They can't- They can't recommend a rule that would go beyond what the Constitution demands?

JUDGE KNOLL: Your authority-

JUSTICE LARSEN: Is that your position?

JUDGE KNOLL: Your authority is not limited. You can announce a new Constitutional standard-

JUSTICE LARSEN: No, no, no, of course we could in a case or controversy.

JUDGE KNOLL: But that's the problem. This isn't the right vehicle.

JUSTICE LARSEN: Right. So I'm wondering- What I'm trying to figure out is when they propose the rules, where- Why is it that you think this statue limits them to only the bare minimum that the Constitution requires?

JUDGE KNOLL: Well, for one thing, the statute uses the phrase "minimum standards" 24 times.

JUSTICE LARSEN: Yes.

JUDGE KNOLL: And it doesn't use the word "standard" without the adjective "minimum." And there are separate statutory provisions that state that it should be consistent with existing common law Constitutional concepts of what is required for effective assistance of counsel, and I haven't found any case law, either from this Court or the U.S. Supreme Court, that suggest that the arraignment is a critical stage for which counsel must be provided.

JUSTICE LARSEN: So even if I were to agree with you on your construction of *Rothgery*, the question I'm trying to get at is whether they might be able to propose and they might be able to approve something that is more protective of defendants' rights than the U.S. Constitution, and if the answer is no, I'm wondering if you can show me in the statute where that comes from.

JUDGE KNOLL: Well I don't believe that was the statutory intent. There are several places in the statute- I'm going to try and quickly refer you to. Nothing in this- Section 23: Nothing in this Act should be construed to overrule, expand, or extend, either directly or by analogy, any decisions reached by the United States Supreme Court or the Supreme Court of this State. And the other provisions of the statute provide that the standards shall meet Constitutional requirements for effective assistance of counsel.

JUSTICE LARSEN: Yeah, so-

JUDGE KNOLL: If they're Constitutional requirements, they're requirements that the Court has said are Constitutional requirements, not that the- What the legislature or the Commission has said are Constitutional requirements.

JUSTICE LARSEN: Okay. So you construe neat Constitutional requirements to mean do no more than the Constitution absolutely requires?

JUDGE KNOLL: Right.

JUSTICE LARSEN: Not do at least that much and maybe more?

JUDGE KNOLL: Right. That's the burden we're going to be imposing on local funding units and-

JUSTICE LARSEN: I'm just asking for what your position is.

CHIEF JUSTICE YOUNG: I think you exceeded your questioning time.

JUSTICE LARSEN: Yes, I'm sorry.

[LAUGHTER]

JUSTICE LARSEN: I just wanted to make sure I got that right.

JUDGE KNOLL: Alright, I hope I answered that.

JUSTICE LARSEN: Thank you.

CHIEF JUSTICE YOUNG: Thank you very much.

JUDGE KNOLL: Thank you.

CHIEF JUSTICE YOUNG: Judge Reincke.

JUDGE REINCKE: The Michigan District Judges' Association has reviewed the proposed minimum standards for appointed counsel, we urge you to support- We support these standards and urge you to adopt them. The questions and concerns seem to be primarily on the Fourth Standard. District Judges in Grand Rapids and Ingham County have reported very successful outcomes from pilot projects over two years during which they worked through problems to arrive at effective ways to provide representation at arraignment. These pilot projects were funded through SCAO's Court Performance Innovation Fund Grant Program. We thank you for your leadership in anticipating this issue and proving that we can provide counsel at arraignment. In attempting to facilitate justice in my courtroom in Eaton County, I am very often in the situation of suggesting that a defendant not plead guilty at arraignment. I may be warning them of the driver responsibility fee on a driving while license suspended, and the prosecutor might let them plead to something that doesn't have that large fee. Or I may be suggesting they plead not guilty to retail fraud because the prosecutor is apt to offer them a diversion program if they come back for a pre-trial. For domestic violence, I might encourage someone to ask for an attorney who can talk to the prosecutor to try to secure a 7694(A) deferral status. This should not be judge's role. For the system to really work for all defendants, there should be a lawyer present to tell them about the consequences of a quick guilty plea. As we advance along a trajectory toward greater

justice, the Michigan District Judges believe defendants should have an opportunity to talk to an attorney prior to an arraignment, even if they can't afford one.

CHIEF JUSTICE YOUNG: Thank you.

JUDGE REINCKE: Thank you.

CHIEF JUSTICE YOUNG: Janet Mistele.

MS. MISTELE: Good afternoon, my name is Janet Mistele. I'm a criminal defense attorney from Traverse City, where I've been practicing both indigent and retained criminal defense work for the last quarter-century. I am passionate about what I do, I love what I do, not for one moment would I suggest to you that anybody in this state deserves anything less than effective, if not excellent, representation. If I could provide that for every one of my clients and every other client in this state, I would do so. While there are those here who also firmly believe in all that, perhaps they have overlooked some of our practical difficulties, those of us who are in the trenches every day. I provided you some anecdotal evidence in the letter I submitted on April 27th. Since then, I have a couple more I'd like to share with you. On May 2nd, I was appointed to represent an individual housed at Pugsley Correctional Facility, 25 miles from the Traverse City Courthouse. He was charged with two new felony offenses. The next day I had in the mail to my new client the 58 pages in police reports, a copy of my appearance, my letter of introduction telling him I would make every effort to have a confidential communication with him prior to our probable cause conference. I e-mailed the administrative assistant at Pugsley with whom I've developed a good working relationship. The next day he contacts me, oh, sorry, he's been moved to Muskegon. I spoke with no fewer than four people, including the deputy warden in Muskegon, only to ultimately be told "we cannot arrange for a confidential communication with your client. You'll see him the day of the probable cause conference." At which time, they proceeded to bring my client 15 minutes late. Nonetheless, I made the prosecutor run late, the magistrate run late, because I will meet with my clients before I appear in court with them. We met for a half hour. My point is without reforms across the board, particularly with MDOC, who has called me a lazy defense attorney before because I won't drive three hours to see a client. We need to use the polycom videoconferencing system that's in every court in this state, in every MDOC facilities, that judges use, MDOC employees use, they're used for arraignments for the convenience of the courts

and the convenience of law enforcement. We must use those for defense counsel, particularly for those of us who practice in rural areas and can't drive to the U.P. or the thumb or to Jackson or to Muskegon to meet with a client when perhaps we don't even have a police report. We need everyone invested in the system, we need mandates for everyone, particularly MDOC, so we can provide that excellent reputation [*sic* 1:03:47] they all deserve.

JUSTICE BERNSTEIN: Counsel, I have a question.

MS. MISTELE: Certainly.

JUSTICE BERNSTEIN: What has DOC indicated to you when you would bring this to their attention about these reforms and these initiatives and these issues? What role have they played in terms of these discussions that we're having today?

I can't answer that other than to tell you that they continue to interfere with my ability to communicate with my clients. Two years ago, I took them on when they absolutely refused to let me review, by polycom conference, a presentence investigation report with a felony client, and that is the time I was referred to as a lazy defense attorney because I wouldn't get in my car and drive three hours to see my client. That was not acceptable. I went to my local circuit judges, and they writted the client up, and that was our new policy by the 13th circuit judges, whenever I had a felony client housed out of the county, we're going to writ them up. MDOC got the picture pretty quickly. When Mistele's involved, let her have the polycom to review the presentence reports.

Thank you.

Thank you very much.

Christopher Dennie.

MR. DENNIE: Good afternoon, Your Honors. I am one of the regional consultants for the MIDC. There are six of us, I have southwest Michigan, but I am here to talk to you as an attorney that worked on the pilot project in 63rd District Court for counsel at first appearance. I want to tell you what I learned. I learned that it's necessary for people accused of a crime in this state to have someone there who can counsel them about what's about to happen to them. Court procedures, the bonds, what kind of bonds there are, what the difference between a

personal recognizance bond, a cash surety bond, a 10% bond, and give them frank and honest input as to how likely they are to get the holy grail, the PR bond. I've also spoken to judges throughout my region who have indicated that they feel they believe they provide good information and they protect their rights at arraignment. And I would agree with them, most of them do. Certainly Judges Smolenski and Judge O'Hara do, but there always comes a point in most cases where they have to stop and say well, I can't give you legal advice, and they can't answer a question. That's what an attorney there is for. An attorney has no such constraint and can answer those questions. I know you have information about the statistics and stuff from the administrators, I want to share a couple of examples from my experience as an attorney. There was one lady who I had talked to over the video who had indicated to me that she was going to be very nervous, she didn't know what was going on, and she wanted to give me the information so I could pass it on if she froze up in front of the judge. So I took her information, I jotted down notes, and when it came time for her to be arraigned, in fact, she did freeze up. She had some good information she should have told judge, she totally blanked and didn't say anything. I was able to stand up, pass along that information, and ultimately the judge gave a PR bond for this lady. I spoke- Or it was a magistrate. I spoke to the magistrate later, and he indicated that when he originally reviewed the file, he had intended to give a cash surety bond to this woman, who may have not been able to post that bond and may have spent more time in jail. I had another woman who was in for a walk-in arraignment on a minor in possession of alcohol. She was arraigned, the judge gave her a chance to go speak with the prosecutor for the pretrial conference immediately, and she came back with a wonderful offer and a first offense MIP as charged, no jail. I was able to point out that this was a non-jailable offense and suggest to the judge that perhaps the MIP diversion would be appropriate, and in fact, she was granted the MIP diversion and is able to attempt to keep her record clear and not walk out with a conviction and an illusory pleading. These are the reasons I think it's important, Your Honors, to adopt Standard 4 from my experiences. Thank you.

CHIEF JUSTICE YOUNG: Thank you very much. Kyle Trevas.

MR. TREVAS: Thank you. My name is Kyle Trevas, I am a public defender in northwest Michigan. I actually provide services in three counties: Grand Traverse County, Kalkaska County, and Leelanau County. May it please the Court. I am here not because I oppose what is being done here or what is being

accomplished. I think we have a situation here in which everyone is blinded by trying to produce the greater good. I think this Court recently reaffirmed what we all know: the words of legislation matter in the *Dunbar* case. I think if the Court looks through the standards, we have a lot of verbiage that is not appropriate, that is generally pointing to counsel when we should be talking about the system. The first standard discusses counsel shall know substantive law. We look up Black's, and we understand what "shall" means, and we understand what "substantive" means, that says the standard is counsel needs to know basically everything. That's the first standard. That's where we start. I need to be perfect in my legal knowledge. That is where we begin. We then whittle it down and try to get a little more specific and we go into the commentary and we try and fix things, but these standards are replete with those type of examples. Let us clean it up in the staff commentary. Let us tell you what we really mean – ignore the words we are using. Okay. "Counsel shall" is basically in every one of these standards. This is about the indigent defense system, not about me individually. Largely, I feel the goal here is great, but when I look at these standards, all I see are burdens on myself, nothing to improve my ability to represent my clients. There is no hope here. There is nothing in these standards that makes it so I can provide better services to my clients, which is what I want to do. I would love for the support. I read these standards, and I see things that I'm going to get attacked on. Things I've already heard: You didn't see me within 72 hours. Right off the bat, I work in three counties, okay, my caseload is not overly large, they're very rural counties. Okay. Some of the counties, I don't get my appointments until the day after I've been appointments. Some of these same counties, when I send my appearance over – which, this stuff takes time, I have to actually type, you know, change the names, print it out, fax it over – when I send my appearance over, I don't get them e-mailed to me, when I get the police report. It goes into a mailbox in the county prosecutor's office. So I have to physically drive over there. I am not against seeing my clients. Three days just isn't necessarily practical and doesn't accomplish the goal. There should be a more reasonable standard, as in- Within 48 hours before the probable cause conference or something of that. It is important to see your clientele before the probable cause [INAUDBLE 1:10:57], but it's also very important to me that I have a police report and I know what's going on. I need information. Thank you very much.

CHIEF JUSTICE YOUNG: Thank you. Those are all the endorsed speakers; the matter is concluded for the day. Thank you very much.